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The Honorable Peter Ney, Colorado Court of Appeals

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THE HONORABLE PETER NEY, COLORADO COURT OF APPEALS

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Judge Peter Ney's judicial opinions strike the reader much like complex renaissance paintings. In the background are the landscapes of the times—the trees and rolling hills comparable to the general subject matter of criminal law, local government, commercial transactions, and family law. In the middle range lies the city, town, or specific building—much like the facts of the case. And in the foreground is the specific subject of the painting—a particular individual or group of persons—much like the people and interests that come into play in a trial. When one views a series of cases, like a series of paintings, common themes are visible. The grand dominant theme in Judge Ney's opinions is that arbitrary governmental action is properly and rightfully limited, and that, on those occasions where individual liberties or powers are improperly limited, the individual must prevail. A second related theme is that the rights of the less powerful must be carefully protected by the law in operation.

Before turning to an examination of some particular cases, I would like to tell you something of Judge Ney's background. Peter Ney was born in 1931 in Nuremberg, Germany. At the age of seven, due to Nazi intimidation of Jews, he emigrated to England without his parents, who were required to stay in Germany for more than six months after he left. His emigration was made possible by an English organization to rescue children endangered by the Nazis. He attended boarding school in England, and in 1940, with his parents, emigrated again, this time to the United States. His family settled in the Philadelphia area. He attended public schools, and entered the Philadelphia College of Art. He obtained a bachelor of fine arts degree, majoring in product design. Thereafter, he worked in industrial design.

After a two-year stint in the Army in the mid-1950s, he returned to the field of industrial design. Russia's launching of Sputnik sparked his interest in work in the space program. In 1959, he joined the Martin Company in Baltimore to work on human factors connected to space capsules. In 1960, he and his family moved to Denver, where he continued to work in the field, becoming head of the department of human engineering at Martin in 1965. Meanwhile, motivated by intellectual curiosity, in 1963 he enrolled in night classes at the University of Denver Law School. He graduated in 1966.

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After law school graduation, Judge Ney opened a solo law office in the Littleton-Englewood area, and in 1967 also worked part-time as an Arapahoe County deputy district attorney. He practiced solo for twenty-two years, with most of his cases involving criminal defense, personal injury law, and domestic relations. He handled numerous cases pro bono for the American Civil Liberties Union, including the representation of University of Denver students expelled for on-campus demonstrations, and also handled First Amendment cases challenging various obscenity statutes for booksellers' associations and the Tattered Cover Bookstore. In a case with echoes from his own youth, he successfully represented a Vietnamese mother seeking the return of her four-year-old son from adopting parents who had obtained the boy shortly after the fall of Saigon in 1972.

In 1988, after twenty-two years of solo practice, Judge Ney was appointed by Governor Roy Romer to the Colorado Court of Appeals.

Nine cases serve to illustrate both the range of Judge Ney's work, and the dominant theme of balancing individual rights against the coercive power of government.

1. Criminal Law Cases

In *People v. Sprowl*,[1] the police obtained a court order for a wiretap, and, as a result of information obtained therefrom, obtained arrest warrants for twenty-six individuals, including the defendant. When the police officer appeared at defendant's residence, defendant agreed to speak to the officer, but first excused himself and closed the doors to several rooms. Defendant then returned to speak to the officer and closed the front door behind him. The officer arrested the defendant and entered the house to determine whether another person was inside. Once inside, the police officer heard what he thought was a fan and a pump, the sound emanating from the basement. The officer obtained a search warrant, and found numerous marijuana plants and over twelve grams of cocaine.

On defendant's motion, the trial court ruled the evidence obtained from the wiretap inadmissible, and also ruled the initial warrantless search unlawful. The People appealed, and after certain other proceedings resulted in a conviction, the issue before the court of appeals was whether the evidence obtained as a result of the search should be suppressed as the illegal fruits of the initial entry.

In the court of appeals opinion, Judge Ney first carefully set out the controlling standard, relying on *Murray v. United States*:[2] "a search pursuant to a warrant cannot be considered an independent source of evidence if the decision to obtain the warrant was prompted by observations made during a prior illegal search, or if information . . . was presented to the magistrate and affected his decision to issue the warrant."[3]

1. 790 P.2d 848 (Colo. Ct. App. 1989).
2. 487 U.S. 533 (1988).
3. *Sprowl*, 790 P.2d at 850.

Judge Ney then scrutinized in detail the affidavits supporting the warrant to see if the standard had been met. There simply was insufficient information presented, apart from the tainted material, to support the warrant, he concluded. The court determined the evidence was inadmissible and reversed the conviction. Judge Van Cise dissented with conclusory remarks indicating that the untainted information, in his view, was sufficient. The Supreme Court denied certiorari.

In *People v. Smith*,[4] it was the right of confrontation that was at issue rather than the right to be free from unreasonable searches and seizures. There, three individuals were investigated for the shooting of a victim sometime after an argument. Two co-defendants gave statements to the police and ultimately pleaded guilty to second degree murder and received an agreed-upon sentence. Each refused to testify at the trial of the third defendant, Smith. The trial court admitted portions of the co-defendants' statements, excising those portions where their statements disagreed with each other.

In the court of appeals opinion, Judge Ney, citing *Lee v. Illinois*,[5] noted that under controlling United States Supreme Court standards, a co-defendant's out-of-court statement is admissible if it bears sufficient indicia of reliability to overcome a presumption of untrustworthiness. He also noted, however, that in *Lee* the defendant had made a statement of his own to which the co-defendant's statement could be compared. Here, there was no such statement and no such "interlock." Moreover, here the co-defendants' statements were obtained only after they were told another defendant had implicated them, and in an attempt to curry favor with the police. In addition, material differences in the co-defendants' statements supported the presumption that a co-defendant's statement is not trustworthy. Under these circumstances, the court reversed the conviction. Judge Ruland dissented, pointing to specific factors he thought showed the reliability of the statements. The Colorado Supreme Court denied certiorari.

In *People v. Auld*,[6] the Court was faced with an extraordinary situation where a zealous prosecutor had filed a fictitious criminal complaint against an imaginary defendant in order to determine whether a defense lawyer was engaging in drug activity. The lawyer was charged with illegal weapons dealing, and upon a motion to suppress, the trial court dismissed the charges, citing "outrageous governmental misconduct." The court unequivocally rejected the district attorney's contentions that the dismissal violated the separation of powers doctrine, that there was no prejudice to the defendant, and that dismissal was too severe a sanction. In the opinion of the court, the prosecutor, by filing a false complaint, made the

4. 790 P.2d 862 (Colo. Ct. App. 1989), *cert. denied*, 1990 Colo. LEXIS 291 (Colo. Apr. 23, 1990).

5. 476 U.S. 530 (1986).

6. 815 P.2d 956 (Colo. Ct. App. 1991), *cert. denied*, 1991 Colo. App. LEXIS 12 (Colo. Ct. App. 1991), *cert. denied*, 112 S. Ct. 1163 (1992).

court an unwitting accomplice for the prosecution. Once again, the Colorado Supreme Court denied certiorari.

2. Other Governmental Activity

In *People v. Bucholz*,[7] the court faced the difficult issue of whether the government under the Care and Treatment Act may compel a person who is expected to become gravely disabled without medication may be compelled to take medication before actually reaching that condition. Noting that the statutory definition controlled, Judge Ney pointed out that a "gravely disabled" person is defined as one who *is* unable to take care of basic needs or *is* irrational due to mental illness. He also noted that the Colorado Supreme Court had held the Care and Treatment Act must be liberally construed because of the curtailment of personal liberty involved. Judge Ney's opinion, reversing the trial court, stated that the future possibility of grave disability was insufficient to uphold the trial court's certification. The opinion cited California authority to the same effect. Colorado's Care and Treatment Act had been modelled on a California statute.

In *Denver Publishing Co. v. University of Colorado*,[8] the court was faced with determining the reach of Colorado's Open Records Act. The University of Colorado (CU) had terminated the employment of Galen Drake as Chancellor. The dispute was arbitrated and a settlement agreement was reached. Denver Publishing (the Rocky Mountain News) sought all records regarding Drake, all contracts with Drake, all policies regarding leave for administrators, and all contracts with other chancellors. CU refused to provide most of the information.

The trial court held that certain of the documents withheld had been improperly classified as personnel file documents, and were, therefore, subject to disclosure. The Court of Appeals affirmed, holding that Drake's legitimate expectation of privacy in the contractual documents must yield to the "clear intent of the Open Records Act,"[9] and that the public interest is served by disclosure.

> The university argues that disclosure, contrary to the expectation of parties, of the terms of the settlement of a controversy may chill its future ability to resolve internal matters of dispute, thus effectuating a substantial injury to the public interest. While such an effect is possible, the public's right to know how public funds are expended is paramount considering the public policy of the Open Records Act.[10]

Christy v. Ibarra[11] presented questions of statutory construction of federal statutes. Plaintiffs brought the action to compel the State's Home

7. 778 P.2d 300 (Colo. Ct. App. 1989)
8. 812 P.2d 682 (Colo. Ct. App. 1990)
9. *Id.* at 685.
10. *Id.*
11. 826 P.2d 361 (Colo. Ct. App. 1991) *cert. denied* 1992 Colo. Lexis 232 (Colo. Mar. 1992).

Based Care System under Medicaid to provide benefits to them. There was no dispute that plaintiffs were eligible in fact; however, they lived in counties which had no agency to provide the individual needs assessment required as a prerequisite to receiving care. The Department of Social Services contended that it was "in effect" in compliance with the federal Medicaid statute that requires that a state plan for medical assistance "shall be in effect in all political subdivisions of the state," even though no services are provided in certain parts of the state, because there are procedures and requirements established for *certification* of management agencies throughout the state. The state argued it had no further obligation.

The appeals court noted that the state could fill the gap services provision when counties do not provide services. It also found that, under the existing system, a recipient might lose services simply by moving from one county a few miles to another county. "We conclude," the court held, "that this results in a plan to provide medical assistance which is not 'in effect' statewide,"[12] contrary to federal regulations. Judge Ney noted that remedial legislation such as the Social Security Act is to be liberally construed. However, the court also held that only uniformity was required, not an increase in the level of services afforded eligible recipients already receiving services or those who would benefit from the court's ruling. The court also reversed the trial court's dismissal of parallel claims under other portions of the Medicaid statute.

3. Commercial Disputes

In *Mineral Deposits Ltd. v. Zigan,*[13] the court was faced with defining the reach of trade secrets and unjust enrichment law compared to the pro-exploitation of knowledge and technology policies underlying patent law. There, Mineral had developed a spiral concentrator, a device for recovering gold particles from sand and gravel. It was patented in Australia. Zigan contacted Mineral's sales representative and said he was interested in purchasing up to 200 machines, and the representative agreed to lend Zigan the machine for Zigan to test its efficiency. Zigan removed the patent label, and gave the machine to another person who took the machine apart and then proceeded to make copies. Mineral demanded damages in the amount of profits it would have made had it sold the number of machines defendants used or sold to others (170). Had the device been patented in the U.S., a patent infringement suit presumably would have been brought.

Judge Ney ruled that a trade secret does not lose its character simply because it is offered for public sale. Here, the device was lent for testing for possible sale; not for duplication and possible re-sale. Thus, the court affirmed the finding of liability for misappropriation of a trade secret. The court applied the principles of the Restatement of Torts, sec. 757 to this situation. The damages award also was affirmed. A finding of fraud as

12. *Id.* at 364.
13. 773 P.2d 606 (Colo. Ct. App. 1988).

to defendants other than Zigan was reversed, due to the lack of misrepresentations by them.

In *Denver West Metro. Dis. v. Geudner*,[14] a metropolitan district had condemned a right of way over land owned by Geudner. The trial court determined that the condemnation action was brought in bad faith because there was no public necessity for condemnation—rather the land was being sought to facilitate the sale of property owned by relatives of the controlling district's board members. The court noted that the board members' disclosure of an interest did not limit the court's review of the "bad faith" character of the condemnation. The court also held that an incidental public benefit does not control a finding that the essential purpose is or is not a public benefit. The appeals court affirmed the trial court's conclusion that the essential purpose was to assist another landowner in concluding a commercial transaction and thereby advance the private interests of the District's officers. Based on substantial evidence supporting that conclusion, the trial court's ruling was affirmed.[15]

4. Family Law

In the case of *In re the Marriage of Bookout*,[16] the court faced the difficult issue of determining whether in a divorce proceeding involving a professional practice, maintenance based on the value of the practice may be awarded in addition to the division of property based on the capitalization of earnings involved. The husband in *Bookout* was a physical therapist who had established a practice with ten employees. The wife had recently become employed as an interior designer at a very modest salary. The trial court ordered the husband to pay over to the wife substantial sums, based on a marital estate over half of which was represented by the husband's practice. Noting the wife's living needs were substantially greater than her income and that payments from the husband's practice would be deferred, the trial court also ordered the husband to pay maintenance and child support to the wife. The husband argued this amounted to a double recovery, and also attacked the trial court's findings of valuation of the practice, based on the wife's expert's testimony.

Judge Ney first rejected the attack on the expert testimony for wife and the trial court's reliance thereon. Then, he turned to the critical issue. He noted that goodwill of a professional practice is an asset acquired during the marriage. Maintenance and child support, in contrast, are based upon a prospective difference between the two persons in earning power. Goodwill supplements the earning power of a business or practice and is not the earning capacity itself, he ruled. Judge Criswell specially concurred, suggesting that a deduction must be applied to husband's income for that maintenance attributable to the share of goodwill husband had been required to transfer to the wife.

14. 786 P.2d 434 (Colo. Ct. App. 1989).
15. *Id.* at 437.
16. 833 P.2d 800 (Colo. Ct. App. 1991).

All of the foregoing decisions pay careful attention to the trial court record and reasoning. They display a faithfulness to United States and Colorado Supreme Court decisions as binding precedent. The decisions also present a reasoned articulation of principles underlying a sound application or distinction of those precedents. They display attentiveness to the importance of each lawsuit to the individual or governmental entity involved. None of these cases has been reviewed or reversed by the Colorado Supreme Court. Peter Ney is a judge's judge, in whose hands the most difficult cases may be put for fair and principled decision-making.